United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7333

(42351)

To be argued by
L. KEVIN SHERIDAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

JANE MONELL, SUSAN TERRALL, BEVERLY ZAPATA, and CAROL ABBEY, on their own behalf and on behalf of all others similarly situated,

Plaintiffs-Appellants,

—against—

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, JULES M. SUGARMAN, as Commissioner of the Department of Social Services, BOARD OF EDUCATION OF THE CITY OF NEW YORK, HARVEY B. SCHRIBNER, as Chancellor of the City School District of the City of New York, and JOHN V. LINDSAY, as Mayor of the City of New York,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

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BRIEF OF APPELLEES

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BRIEF OF APPELLEES

Preliminary Statement

Plaintiffs, suing in their own rights and on behalf of a class they claim to represent, appeal from an order of

the United States District Court for the Southern District of New York (Metzner, J.), dated April 30, 1975, which, on defendants' motion, dismissed plaintiffs' amended complaint (hereinafter also "complaint").

Questions Presented

1. In an action brought pursuant to 42 U.S.C. §1983 can damages for alleged unlawful discrimination be recovered from governmental entities otherwise immune from suit under that section by the device of naming as parties defendant government officials sued only in their official capacities, and the additional device of characterizing such relief as merely "equitable" in nature?

2. Is the New York City Board of Education, which is a separate corporate body but funded by the City of New York, a "person" within the meaning of Section 1983—at least for purposes of suits wherein a money judgment is sought which ultimately would have to be paid out of the City treasury?

3. Assuming that the governmental entities here sought to be held liable for damages to plaintiffs may be required to pay damages to plaintiffs by means of the device of characterizing the relief sought as "equitable restitution", must plaintiffs' action under Section 1983 nonetheless fail for failure to name as defendants the appropriate public officials having authority to perform the acts which would be ordered in such equitable decree?

4. Assuming plaintiffs may not here be granted relief pursuant to Section 1983, may they nonetheless be allowed to recover the damages they seek pursuant to the 1972 amendments to Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000-e et seq.), allowing governmental entities to be directly sued for civil rights violations?

5. Assuming that the 1972 amendments to Title VII may here by retroactively applied to allow damage awards against the named defendant governmental entities, the Department of Social Services and the Board of Education, does the amended complaint state a cause of action for any relief pursuant to Title VII against the City itself or other City agencies where such other entities have not been named as defendants herein?

6. Assuming that the 1972 amendments to Title VII may be retroactively applied in such circumstances, does the amended complaint adequately allege compliance with the jurisdictional requirements for private actions under Title VII?

7. Assuming that this action is, on any theory, properly maintainable by any of the named plaintiffs in their individual capacities, is it, in its present posture, properly maintainable as a class action?

Statement of the Case

(1)

The gravamen of plaintiffs' complaint is that the named plaintiffs and other women employed by the City of New York and the New York City Board of Education were unlawfully discriminated against, in violation of Section 1983 of Title 42, United States Code, and the 1972 amendments to Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e *et seq.*). The discrimination claimed consists of enforcement of mandatory policies of these governmental entities, since abandoned, pursuant to which pregnant employees were required to take unpaid leaves of absence following the seventh month of pregnancy.

The named defendants are, in addition to the Department of Social Services and the Board of Education, the following individual defendants, sued only in their official capacities: Jules M. Sugarman, former Commissioner of the Department of Social Services; Harvey B. Scribner, former Chancellor of the City School District of the City of New York; and former Mayor John V. Lindsay.

In the suit as originally brought (A3)*, and in the opinion and order of the district court (Motley, J.), approving the class (A10-A13; 357 F. Supp. 1051 [S.D.N.Y. 1972]), it is indicated that relief is sought as to similarly situated employees of not only the Board of Education and the Department of Social Services but also against all other City agencies (the Board of Education is a separate body corporate, funded by the City but not directly subject to mayoral control**), notwithstanding no other City agencies or agency heads or officers are named herein as defendants.

Jurisdiction is invoked pursuant to 28 U.S.C. §1343 (3) and (4) and 42 U.S.C. §2000e-5 (f)(3) (A14). No claim is made in the amended complaint of damages to any individual plaintiff in excess of $10,000. Cf. *Brault* v. *Town of Milton*, —— F.2d —— (2d Cir., 1975), rev'd on *en banc* reconsideration, —— F.2d —— (2d Cir. 1975) (Docket No. 74-2370).

The named plaintiffs and the agencies by which they were employed are: Jane Monell—Social Services; Susan Terrall, Beverly Zapata and Carol Abbey—Board of Education. All of the acts of discrimination claimed to have been committeed against the named plaintiffs occurred prior to the 1972 amendments to Title VII.

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* (References in parenthesis, unless otherwise indicated, are to the Appendix submitted to this Court).

** Education Law § 2576, subd. 5.

In the amended complaint (A14-A25) there is no claim that because of the acts complained of the plaintiffs "lost tenure [or] salary steps" (compare Appellant's Brief, p. 5), and, in the portion of the complaint wherein they describe the relief requested (A24-A25), plaintiffs make no request for relief directed toward any such deprivation. Indeed, insofar as any specific injunctive relief is requested, such relief is restricted solely to an injunction barring *future* enforcement of the mandatory leave policies (which at that time had not yet been formally rescinded) (A24). By way of relief for past wrongs allegedly inflicted upon plaintiffs they pray (*id.*):

> "That an order be entered: A) Awarding plaintiffs and their class *damages* plus interest for the deprivation of their right to be employed, including but not limited to wages lost by reason of the discriminatory acts herein alleged. . . ." (Emphasis supplied.)

(2)

In that part of their complaint wherein they specifically purport to address themselves to the question of subject matter jurisdiction, paragraphs 1-3, plaintiffs allege no jurisdictional facts (A14).

Later in the complaint, they allege (A21-A22):

> "43. Subsequent to the filing of the original complaint in this action, Title VII, of the Civil Rights Act of 1964 . . . was amended to cover municipalities which were previously exempt. Within the statutory period therefore [sic] all named plaintiffs duly filed a discrimination complaint with the Equal Employment Opportunity Commission. Prior to such filing plaintiffs Monell, Terrall and Zapata duly filed discrimination complaints with the New

> York City Commission on Human Rights. Plaintiff Abbey was advised by the City Commission that the pendency of this action, prevented the City Commission from assuming jurisdiction of her complaint."

In their brief on appeal, plaintiffs both expand upon and retreat from these allegations concerned with jurisdiction of their Title VII claim. Thus, they there argue that the district court had jurisdiction to pass upon their Title VII claim because (1) their claim is based upon a pre-existing federal right which was the subject of a suit pending at the time of the 1972 amendments to Title VII and (2) appellant Abbey "filed an EEOC charge within the time limits imposed by Title VII. 42 U.S.C. §2000e-(5)(e)" (Brief, pp. 22-23).

The brief is silent as to when plaintiff Abbey filed her EEOC complaint and as to what if any action was taken on it by the EEOC. Presumably, it was filed prior to the September 14, 1972 filing of the amended complaint, wherein it is stated that *all* named plaintiffs filed timely complaints with the EEOC (A22). No claim is made in the brief that any of the other named plaintiffs filed timely EEOC complaints, or that at the time the 1972 amendments to Title VII were adopted any of the named plaintiffs had pending in any administrative forum a complaint based on the acts here complained of.

(3)

The district court, in its opinion ordering dismissal of plaintiff's amended complaint (A50-A56), stated that by reason of subsequent changes in policy adopted by the governmental defendants, the plaintiffs' requests for declaratory and injunctive relief had become moot (A52).

It analyzed the suit, in its present posture, as presenting only "claims for back pay" (*id.*).

The court indicated that it read *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973), as barring an action under Section 1983 against either the Board or the Department (A53). In addition, citing *Monroe* v. *Pape*, 365 U.S. 167 (1961), the Court pointed out that an action for damages will not "lie directly" against a municipality (A54). Reasoning by analogy to *Edelman* v. *Jordan*, 415 U.S. 651 (1974), and *McMillen* v. *Board of Education of the State of New York*, 430 F. 2d 1145 (2d Cir. 1970), the Court held that the City's immunity could not be "circumvented" by allowing suit to proceed where any award would "in the last analysis, be paid by the City of New York" (A54).

With respect to plaintiffs' contention that their suit for damages was maintainable under Title VII of the Civil Rights Act of 1964, as amended in 1972, the district court, placing primary reliance upon a footnote to the opinion of the Supreme Court in *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 638 note 8 (1974), indicated that it was of the view that *LaFleur* was "dispositive" that plaintiffs could not succeed on a theory of retroactive application of the 1972 amendments to Title VII to their claims (A55-A56).

Accordingly, the district court ordered plaintiffs' complaint dismissed (A56).

ARGUMENT

POINT I

Governmental entities immune from suit pursuant to 42 U.S.C. §1983 may not be cast in damages by the device of suing officials thereof, where such officials are sued only in their official capacities and the sole source of payment of any such judgment would be the treasury of such municipality or otherwise immune governmental entity. Allowing damages to be recovered on such a theory would be both inconsistent with settled equitable principles and contrary to the congressional intent expressed in the enactment of Section 1983, as well as clear indications by the Supreme Court as to how Section 1983 should be construed.

Although what is now Section 1983 has been the law of this country for over 100 years, the statute's precise reach in particular cases continues to be the subject of uncertainty, and the law concerning its applicability continues to evolve. See, e.g., *Monroe* v. *Pape*, 365 U.S. 167 (1961), *Moor* v. *County of Alameda*, 411 U.S. 693 (1973), and *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973) (status of municipalities and counties under §1983); *Johnson* v. *Railway Express Agency, Inc.*, —— U.S. ——, 44 L Ed 2d 295 (1975) (involving a Section 1981 claim but dealing with statutes of limitations applicable to federal civil rights suits generally); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974), and *Wood* v. *Strickland*, 420 U.S. 308 (1975) (both explicating the law in so far as the personal liability of public officials is concerned). In the instant case this court is presented with another question as to which there may be some degree of legitimate uncertainty (compare

Goode v. *Rizzo*, 506 F. 2d 542, 550-551 [3rd Cir. 1974], declining to decide this issue) as to which, so far as we are aware, no clearly definitive answer has as yet been provided by the Supreme Court. This is whether damages may be recovered from the treasury of a municipal corporation itself immune from suit under Section 1983 (*City of Kenosha* v. *Bruno, supra*), upon a theory of "equitable restitution" and by the device of suing, instead of the municipality, municipal officials.

Insofar as actions directed against state treasuries are concerned, the question of the propriety of such "equitable" awards has already been answered, quite definitively, by the Supreme Court. *Edelman* v. *Jordan*, 415 U.S. 651 (1974), squarely holds that damages may not be secured in a federal court from a state treasury by such devices. That decision is based, not on Section 1983, but on the Eleventh Amendment, which generally is accepted as not protecting governmental entities such as the defendants here from suits for damages in federal court (see *Edelman* v. *Jordan, supra*, 415 U.S. at 67 note 12). But the decision is persuasive authority that, analytically, damages may not properly be characterized as "equitable relief" and, by analogy, furnishes strong support for the proposition that such "equitable relief" may not be obtained against lesser governmental entities otherwise immune from suit under Section 1983. See, also, on the analytic approach to be taken to such claims for "equitable relief", *Fitzpatrick* v. *Bitzer*, —— F. 2d —— (2d Cir. 1975), 10 EPD cases ¶10,270.

In addition, the Supreme Court has already in a number of decisions at least implicitly indicated that an awards of damages on such a theory against a municipality would be improper. Most particularly, we rely here upon the Supreme Court's decisions in *Monroe* v. *Pape, supra, City*

of Kenosha v. *Bruno, supra,* and *Moor* v. *County of Alameda, supra,* which decisions, read together, seem clearly to indicate that the very same rule which *Edelman* v. *Jordan* held applicable to claims against state treasuries is applicable to Section 1983 suits directed against municipal treasuries based upon past wrongs. Indeed, we would note, if the view which we here advance is not correct, then those decisions make simply no sense. They might as well never have been written, for if the plaintiffs here are correct, those decisions, so easily subverted, accomplished nothing.

As we read the decisions of the Supreme Court having to do with the applicability of Section 1983 to municipal corporations, it is abundantly clear that declaratory and prospective injunctive relief is in fact available against such entities under Section 1983 by means of suits wherein appropriate governmental officials are named as defendants (cf. *City of Kenosha* v. *Bruno, supra,* 412 U.S. at 513), just as the same sort of relief is available against states, by means of actions against state officials, notwithstanding the Eleventh Amendment (*Edelman* v. *Jordan, supra,* 415 U.S. at 664-665; *Fitzpatrick* v. *Bitzer,* supra).

Similarly, it is now well settled that state and municipal officials not only may be ordered, *in futuro,* to conduct themselves in their official capacities in conformity with their constitutional obligations, subject to punishment for contempt, but also may themselves be held personally liable under appropriate circumstances for past violations of Section 1983 even without a prior court decree (see, e.g., *Wood* v. *Strickland, supra; Scheuer* v. *Rhodes, supra.*)

At the same time, however, consistent with the intent of the Congress which enacted what is now Section 1983, and sensitive to what that Congress viewed as an Eleventh Amendment impediment to allowing civil rights

suits directed at municipal treasuries (see *Moor* v. *County of Alameda, supra,* 411 U.S. at 707-710; *Monroe* v. *Pape, supra,* 365 U.S. at 188-192), the Supreme Court has refused to allow, at least by direct suit, municipalities to be cast in damages for violations of Section 1983 by municipal officers or employees. And it is this concern for municipal treasuries which, we submit, also accounts for the Court's decision in *City of Kenosha,* where, at least in the first instance, all that the plaintiffs there sought was declaratory and prospective injunctive relief, without, however, having named as defendants the appropriate municipal officials.

In City of *Kenosha,* and this is the only way the decision makes practical sense, the Court must have been concerned that in the event of a failure to comply with an equitable decree entered against it by one or the other of the municipalities there sued, such municipality would be subject to a fine for contempt, thus exposing the municipal treasury to liability. Alternatively viewed, but leading to the same result, the Court, based on the legislative history of Section 1983, must have concluded that under that section a municipality enjoys the very same immunity from suit as does a state under the Eleventh Amendment.* If that is the case, then *Edelman* v. *Jordan* should surely here apply.

The Supreme Court's demonstrated concern for adherence to the intent of the Congress which enacted what is now Section 1983 and the clearly evidenced intent of that Congress are, we submit, most persuasive evidence

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* On the other hand *City of Kenosha* does not appear to bar naming as a defendant in a Section 1983 suit a municipality, just so long as there are also joined in that suit individual defendants. At the same time, somewhat illogically, the Court's opinion does seem to indicate quite clearly that such entities are not "persons" within the meaning of Section 1983.

that that is precisely what *City of Kenosha* means and that if the issue presented here were presented to that Court, it would decide this question in accord with its decision in *Edelman* v. *Jordan*. See, squarely supporting this view, *Adkins* v. *Duval County School Board*, 511 F. 2d 690 (5th Cir. 1975). (Indeed, *Adkins* is directly in point on not only this issue but on the issue of a school board's status under section 1983, discussed *infra*, Point II.)

In support of their argument that they can here recover damages as "equitable restitution" from the City's treasury, plaintiffs cite numerous decisions of this and other courts which they contend support their view. However, not one of the many decisions cited by plaintiffs clearly supports their argument for "equitable relief" by way of an award of damages against a party not a "person" within the meaning of Section 1983. In many of the cases cited it is clear that prospective injunctive relief was sought, and that, if damages were sought, these might well properly be awarded against individual defendants in their individual capacities. See, e.g., *Bloeth* v. *Montanye*, 514 F. 2d 1192 (2d Cir., 1975) (cited in Appellant's Brief at p. 10). Moreover, in the cases cited in which monetary awards for back pay were made and apparently approved by appellate courts, it is obvious that those courts were never confronted with the precise argument made by the defendants here. Indeed, even among the cases cited as having "squarely adopted" plaintiffs' view (Brief, p. 10), there are at least two decisions which clearly indicate hesitation to allow an award of damages against a government official sued only in his official capacity. See *Gay Students Org.* v. *Bonner*, 509 F. 2d 652, 655 (1st Cir. 1974) (officials held "persons" within the meaning of §1983 "at least so far as injunctive or declaratory relief is concerned"); *Ingraham* v. *Wright*, 498

F. 2d 248, 252 (5th Cir. 1974) (suggests that plaintiffs might be entitled to "equitable relief" against a school board or its members—clearly suggesting prospective relief only).* But see, taking an analytic approach apparently very close to what plaintiffs here urge, *Incarcerated Men of Allen County Jail* v. *Fair*, 507 F. 2d 281, 287-289 (6th Cir. 1974), allowing an attorney fee award (not damages) against official defendants in a Section 1983 action, where the award was to be paid out of public funds.**

As we read the *Allen County Jail* decision, the Court there, as do plaintiffs here, simply failed to consider adequately — if at all — the concern of the Congress which enacted Section 1983 with the possible impediments posed by the Eleventh Amendment to allowing municipalities to be sued in federal court for civil rights violations. Compare *Moor* v. *County of Alameda, supra.* It is that concern, which has guided the Supreme Court in its construction of Section 1983, which we submit mandates here application of the rule of *Edelman* v. *Jordan.*

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* In view of the Fifth Circuit's later decision in *Adkins* v. *Duval County School Board, supra,* 511 F.2d 690, we are at a total loss to understand how plaintiffs can claim (Brief, p. 10) that that Court has "squarely adopted" the view which plaintiffs advance. Plaintiffs are aware of and, indeed, cite *Adkins* in their brief (p. 8). Similarly mystifying is their citation of *Rochester* v. *White,* 503 F.2d 263 (3rd Cir. 1974), as representing an endorsement by the Third Circuit of their position. Compare *Goode* v. *Rizzo, supra,* 506 F.2d 542.

** We have no quarrel with the view that attorneys' fees may be awarded as "ancillary" equitable relief where allowed by statute or other appropriate exception to the "American Rule." *Compare Alyeska Pipeline Service Co.* v. *The Wilderness Society,* U.S. , (1975), 43 U.S.L.W. 4561, and *Fitzpatrick* v. *Bitzer, supra, with Kirkland* v. *New York State Dept. of Correction Services,* F.2d (2d Cir. 1975), slip. op. 5397.

Adoption of the view of this issue which we here urge will not "effectively gut §1983" (Appellant's Brief, p. 11) or lead to its "evisceration" (*id.*) or "strip [it] of all vitality" (*id.*, p. 13). As we have indicated *ante*, even under our view of Section 1983, it may be used as a potent "sword, rather than merely as a shield" (*Edelman* v. *Jordan*, *supra*, 415 U.S. at 664) against wrongdoing by officials of municipalities as well as states. All that we ask is that it be confined in its application within the limits to which the Supreme Court has repeatedly indicated it should be kept.*

So confined, Section 1983 is not stripped of its vitality, but rather may be applied in a fair and balanced fashion, wherein in a constantly evolving field of law the rights and obligations of plaintiffs and defendants may be equitably determined and injustice avoided. Compare Schaefer, *Precedent and Policy*, 34 U. Chi. L. Rev. 3, 14-18, (1966).** At root, we submit, this is the spirit which has animated the Supreme Court's decision in *Monroe* v. *Pape*, *City of Kenosha*, and *Moor* v. *County of Alameda*. And, indeed, this spirit can be most clearly discerned in other of the Court's decisions construing Section 1983, especially in the area of personal liability of public officials

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* We call attention here also to the various district court decisions cited by Judge Metzner at page 6 of his opinion (A54), which support our view of the law on this issue.

** In effect, at least insofar as the issue of damages is concerned, it would appear that in the Supreme Court's decisions construing Section 1983 there have been recurrent "sunbursts." See *Great Northern Ry.* v. *Sunburst Oil and Refining Co.*, 287 U.S. 358 (1932). From the standpoint of sound jurisprudence, this would appear entirely appropriate. See SCHAEFER, *Precedent and Policy*, *supra*, 34 U. Chi. L. Rev. 3, 14-18 (1966).

and employees under that section. See *Wood* v. *Strickland, supra,* 420 U.S. at 316-322.

Just as public officials have not been required to be prophets with respect to further refinements in constitutional law, and have been accorded varying degrees of immunity from awards for damages based on their official acts, municipalities and similar governmental entities should be protected from liability for acts performed by their officers and employees pursuant to long accepted policies which only much later have been held to be unconstitutional.

Truly, there has taken place in this country in the past 20 years a revolution in the field of civil rights, and a most welcome revolution. But that revolution should not exact from hard pressed localities and their limited treasuries retribution for past acts which were, by and large, generally considered perfectly lawful and over which, as a practical matter, citizens and taxpayers had little control

Both "common-law tradition" and "strong public policy reasons" (see *Wood* v. *Strickland, supra,* 420 U.S. at 318), as well as precedent, counsel here against allowing relief of the sort which these plaintiffs seek.

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as to jurisdiction, but rather only the issue of *res judicata* had been presented to the district court or this Court, and various cases involving state and municipal housing authorities.

With respect to *Escalera* v. *New York City Housing Authority*, 425 F. 2d 853 (2d Cir. 1970), cert. denied, 400 U.S. 852 (1971), as well as *Holmes* v. *New York City Housing Authority*, 398 F. 2d 262 (2d Cir. 1968), we believe it is sufficient to note that both of those decisions were decided prior to *City of Kenosha*, and in both the primary relief sought was equitable in nature. On these grounds alone they are of doubtful authority today. Moreover, in neither of those cases was the issue of jurisdiction discussed in terms of the history of Section 1983 and the intent of Congress in enacting that section.

With respect to *Forman* v. *Community Services Inc.*, 500 F. 2d 1246 (2d Cir. 1974), rev'd on other grounds, *sub. nom. United Housing Foundation* v. *Forman*, U.S. , 95 S. Ct. 2051 (1975), we would note that the discussion there of Section 1983 jurisdiction over the State Housing Finance Agency (500 F. 2d at 1255-1256) is most cryptic and places uncritical reliance on *Escalera* and *Holmes*, both by that time clearly not controlling authority on this issue. In any event, in *Forman* the question of Section 1983 jurisdiction seems clearly to have been viewed as somehow beside the point in view of the State's express consent to suit. (*Id.*)

In the instant case, where plaintiffs hope to recover damages from the municipal treasury of the City of New York, a full examination of the status of the defendant Board of Education is called for. Compare the analysis in *Fitzpatrick* v. *Bitzer*, *supra*, of the status for Eleventh Amendment purposes of the Connecticut Retirement Fund. Upon such examination, we submit, this Court will agree that this defendant is not a "person" within the meaning of Section 1983.

POINT III

Assuming that plaintiffs may otherwise have a viable cause of action for damages in the form of "equitable relief", their suit must fail for failure to join necessary parties.

Under this point we accept, *arguendo,* the fiction that damages may be properly characterized as "equitable relief" and the proposition that such relief may properly be awarded in a Section 1983 action against municipal officials sued only in their official capacities, directing them to pay out of the public treasury the funds to be awarded. We further assume that the equity decree to be entered will be entered against an appropriate public official having authority to do the act ordered.

Based upon the latter assumption, we urge that the complaint herein is fatally defective for failure to name as defendants the appropriate public officials, to wit, the members of the Board of Education and the City Comptroller.

To the argument that this approach is hypertechnical and smacks of 18th or 19th century pleading niceties, we would respond that so also to this extent is *City of Kenosha* hypertechnical, and that our argument is consistent with the nature of relief accorded in equity and, however technical appearing, is an appropriate response to the fiction with which we are here called upon to contend.

With respect to the Board of Education, we would submit that the complaint is defective for failure to name as defendants the members of the Board, who alone, not the defendant Chancellor, have the authority to direct the City Comptroller to disburse such funds.

With respect to the City we would urge that neither the Mayor nor any City commissioner has any authority to direct payment by the Comptroller and, under him, the Finance Administrator, of such funds. See New York City Charter §§ 3, 7, 8, 123, 124. Rather, the only officer of the City who would appear to have any colorable authority to authorize such an unbudgeted, unusual payment would be the City's chief fiscal officer, the Comptroller. *Id.* §§ 93, subd. c, and 1503, subd. 4.

Again, we grant that this argument is technical, but we submit it is appropriate to the circumstances, correct and fair. As *Johnson* v. *Railway Express Agency, Inc., supra,* 44 L Ed 2d at 304, so well illustrates, there is "nothing peculiar to a federal civil rights action" justifying the conclusion that plaintiffs in such actions should be relieved of the burdens which plaintiffs generally must shoulder.

We submit that these defects are fatal and cannot be remedied on a remand because the underlying cause of action is now long since time barred and thus it would be improper to order a remand on the theory that these necessary parties could now be joined as parties defendant.

POINT IV

Plaintiffs may not recover the damages they here seek pursuant to the Civil Rights Act of 1964, as subsequently amended. Assuming, *arguendo*, that plaintiffs may recover damages based on a retroactive application of Title VII, as amended, against the Department of Social Services and the Board of Education, as against other City agencies and the City itself the complaint should be dismissed for failure to join such entities as parties defendants Assuming plaintiffs may be entitled to maintain this suit on any basis pursuant to Title VII, remand for repleading and consideration of basic jurisdictional issues is required.

(1)

Plaintiffs urge (Brief, Point II) that they and the members of their class should here be allowed to recover damages in this action based upon a retroactive application of the 1972 amendments to Title VII of the Civil Rights Act of 1964 including within the coverage of that title governments, government agencies and political subdivisions (see 42 U.S.C. §2000e (a)). A number of obstacles would appear to stand in the way of this contention, of which the most obvious is the Supreme Court's already stated position on this issue in *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 638-639 note 8 (1974), cited and viewed as "dispositive" on this issue by Judge Metzner.

Plaintiffs' argument that *LaFleur* is not binding on lower courts is unpersuasive. Plaintiffs' extensive, but only partial, quotation (Brief, p. 21) from this Court's opinion in *Communications Workers of America* v. *Amer-*

ican T. & T. Co., Long Lines Dept., 513 F. 2d 1024 (2d Cir. 1975), is disingenuous, and their reliance on that decision misplaced. Plaintiffs notably ignore other parts of that opinion which are here most relevant. Albeit in a footnote, the Court's statement in *LaFleur* is squarely in point, and insofar as this issue is concerned the cases are identical, except to the extent that this is an *a fortiori* case for non-retroactivity. There are, certainly, no "wide differences" between the cases. See 513 F. 2d at 1028. Moreover, the *LaFleur* footnote did cite Title VII and the EEOC guidelines. Compare *id.* at 1030. Indeed, plaintiffs in their brief fail to note, perhaps because it is only marginalia, that this Court in its *Communications Workers* opinion read *LaFleur* as holding precisely what Judge Metzner read it as holding. *Id.* note 11. Perhaps under these circumstances the Supreme Court's *LaFleur* footnote should at least be recognized as the law of this circuit on this issue.

(2)

Even assuming *LaFleur* is not controlling on this issue, based upon sound principles of decision, this Court should reject retroactive application of the 1972 amendments in this case.

In *Brown* v. *General Services Administration*, 507 F. 2d 1300 (2d Cir. 1974), where this Court held that, in certain circumstances, the 1972 amendments to Title VII could be given retroactive application, the Court was quick to point out that its decision that these amendments might be applied retroactively did not end its task of analysis. *Id.*, at 1306. The next question to be determined was whether such application would result in "manifest injustice." *Id.*, quoting from *Bradley* v. *School Board of City of Richmond*, 416 U.S. 696, 711 (1974). This concern was re-

iterated in this Court's more recent decision in *Weise* v. *Syracuse University,* F. 2d (2d Cir. July 14, 1975), 10 FEP cases 1331, 10 EPD cases ¶10,294.

As we believe we have demonstrated *ante,* Point I, where law is evolving, judicial recognition of new rights, even under existing constitutional or statutory provisions,* does not at all require that damages be awarded for past violations of newly recognized rights. Rather, a sound jurisprudence, in attempting to determine an appropriate remedy, considers the justice of imposing such a harsh remedy.

Even if it is not to be accepted as controlling authority on this issue, given the factual similarity between *Cleveland Board of Education* v. *LaFleur* and the case at bar, that decision certainly cannot be as easily dismissed as plaintiffs would dismiss it. Indeed, that decision highlights the injustice of allowing damages in this context, for in that case the Court specifically noted that the maternity leave regulations there struck down (requiring teachers to commence maternity leave four and five months before the expected date of birth) "no doubt represent[ed] a good-faith attempt to achieve a laudable goal" (414 U. S. at 648) and the Court itself suggested that uniform maternity leave regulations requiring termination of employment at a later date ("during the last

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* We concede that under the 14th Amendment and Section 1983 plaintiffs at the time of the acts complained of had a pre-existing, if only dimly perceived, federal right not to be discriminated against by means of unreasonable maternity leave policies. We do not concede that they were in fact unlawfully discriminated against. Nor do we concede that the pre-existing federal right was of the same quality as that involved in this Court's recent *Brown* decision. Cf. *Koger* v. *Ball,* 497 F.2d 702, 707 (4th Cir. 1974).

few weeks of pregnancy") might well be constitutional. (414 U.S. at 647 note 13).*

In the case at bar, where there is no question as to any defendant's good faith and the law on this issue was so uncertain,** it would, we believe, be improper as a matter of law to award damages to these plaintiffs.

(3)

Assuming that plaintiffs may recover damages based on a retroactive application of the Title VII amendments, the complaint should be dismissed to the extent that it seeks relief against the City itself and city agencies other than the Department of Social Services. Very simply, the plaintiffs have failed to name the City or any other city agencies as defendants in this action and as against such parties the statute of limitations on plaintiffs' claim would appear to have long since run.

In addition, to the extent that plaintiffs here have any arguably viable Title VII claim, we would urge that plaintiffs' amended complaint, even as supplemented by the additional jurisdictional claims made in their brief, is totally inadequate insofar as jurisdiction under Title VII is concerned. If there is to be a remand for further consideration of the Title VII claim, plaintiffs should be required to properly plead the necessary jurisdictional facts to support such a claim.

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* Concededly, the regulations here in question required termination of employment earlier than the Supreme Court indicated might be acceptable, i.e., generally after the seventh month of pregnancy.

** By the time this Court decided *Green* v. *Waterford Bd. of Educ.*, 473 F.2d 629 (2d Cir. 1973), the City had changed its policy. The defendant Board of Education amended its by-laws dealing with maternity leave in late 1973 (A29-A30).

POINT V

In no event is this case, in its present posture, a proper class action case.

If there is to be a remand here to the district court for any purpose, we would urge that this Court direct that the complaint be dismissed insofar as it seeks class relief. At this point all that is at issue are damage claims. In addition, the size of the class may well at this point be unknowable and the claim for damages of each potential claimant would have to be separately determined. Under these circumstances, the case is inappropriate for class treatment. See *Galvan* v. *Levine*, 490 F. 2d 1255 (2d Cir. 1973), *cert. denied*, 417 U. S. 936 (1974).

CONCLUSION

The order appealed from should be in all respects affirmed, with costs.

October 31, 1975

Respectfully submitted,

W. Bernard Richland,
Corporation Counsel,
Attorney for Defendants-Appellees

L. Kevin Sheridan,
of Counsel.

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

1 Chester Mitchell being duly sworn, says that on the 31 day of OCT 1975, he served the annexed BRIEF OF APPELLEES upon CENTER FOR CONSTITUTIONAL RIGHTS Esq., the attorney for the PLAINTIFF-APPELLANTS herein by depositing 3 COPIES ~~a copy of~~ the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 853 BWAY in the Borough of MNK, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this

31 day of OCT 1975 Chester Mitchell

Carlos M Rodriguez
Commissioner of Deeds
City of NY
No. 2-2803
Cert. Oct. 1977

Form 323-40M-703823(73) 346

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Chester Mitchell being duly sworn, says that on the 31 day of OCT 1975, he served the annexed BRIEF OF APPELLEES upon OSCAR A. CHASE Esq., the attorney for the PLAINTIFF-APPELLANTS herein by depositing 3 COPIES ~~a copy of~~ the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 250 BROADWAY ST in the Borough of NEW YK, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this

31 day of OCT 1975 Chester Mitchell

2 Carlos M Rodriguez
Commissioner of Deeds
City of NY
Cert. Oct 1977

Form 323-40M-703823(73) 346

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Chester Mitchell being duly sworn, says that on the 31 day of OCT. 1975, he served the annexed BRIEF OF APPELLEES upon ARTHUR ABBEY Esq., the attorney for the PLAINTIFF-APPELLANTS herein by depositing 3 COPIES ~~a copy of~~ the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 145 STATE ST in the Borough of NEW YK, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this

31 day of OCT 1975 Chester Mitchell

3 Carlos M Rodriguez
Commissioner of Deeds
City of NY
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